IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 288 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 yes, 2 to 5 No.

NATHMAL M. TAPADIA

Versus

ALLIED SUPPLIERS

Appearance:

MR.N.K.THAKKAR,for Petitioner.

DS AFFI. FILED for Respondent No. 1

CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 18/10/96

ORAL JUDGEMENT

The appellant, who is the original defendant, has preferred this Appeal From Order against the judgment and order dated December 28,1987, passed by the learned Judge,9th Court of Ahmedabad City Civil Court. By the impugned order, the learned Judge dismissed the application filed by the defendant for setting aside the ex parte decree in Summary Civil Suit No.830/84 and to

take the case on file for hearing and disposal.

The respondent-plaintiff had filed Summary Civil Suit No.830/84 against the appellant herein for recovery of his dues. The said suit was decreed on 8.9.1986 by passing the ex parte decree against the appellant. He, therefore, filed the application, being Application No.691/86, to set aside the ex parte decree on the ground that the defendant had gone in search of employment for livelihood of himself and his family members at the time when the suit was posted for hearing. He had to be out of station in search of employment to discharge his responsibility of maintaining his family-members. He had, therefore, gone to Agra and stayed there for about three months. The suit was on daily board of the trial Court from 26th June 1986 onwards. It was thereafter adjourned to 28th June 1986 and then to 9th July 1986. On 6th August 1986, the learned Advocate for the defendant-appellant had retired from the matter and the matter was adjourned to 12th August 1986. The ex parte judgment ultimately was delivered on 8th September,1986. It appears that the learned Advocate for the defendant, at the time of retiring from the suit, had intimated the defendant. However, according to the defendant, he was out of station at the relevant time in search of employment as stated hereinabove and no intimation was received by him. His family-members being illiterate and ignorant of court proceedings and procedure, could not inform him at Agra. Under the circumstances, an ex parte decree was passed and the same was sought to be set aside, urging that there was sufficient cause to quash the ex parte decree. The learned Judge dismissed the application holding, inter alia, that there was no sufficient reason to set aside the decree. It is against this order that the present appeal is filed.

I have heard Mr.N.K.Thakkar, learned Advocate appearing for the appellant. The notice of the appeal, at the time of the admission of the appeal, was sought to be served on the respondent, but one Shri Yashodanandan Natvarlal Kabra, who was the partner of the plaintiff-firm at the relevant time and who had verified the plaint, refused to take the notice of this Court. The appelant has filed the affidavit in this connection stating:"As direct service was ordered in this case, I have delivered the sealed-packet at the office of the Principal Judge, City Civil Court, Ahmedabad. On 2.2.'89 I went at the business premises of the respondent, where Shri Yashodanandan Kabra was present.I showed him the

letter of authority to serve, and asked him to receive the order of the Hon'ble High Court, and the copy of memo of Appeal and requested him to sign for the receipt of the same; he refused to receive the same, saying that he was no more a partner..."

Thereafter the appellant approached Shri Shirish Kabra, who was named by Shri Yashodanandan Kabra for service of notice on 4.2.1989. He also refused to take the delivery of the notice and apeal-memo. It appears that the notice was also sent under postal certificate. In these circumstances, the notice to the respondent is held to be duly served on the respondent. However, nobody from the respondent-firm has bothered to appear.

The learned trial Judge, while dismissing the application for setting aside the ex parte decree, held that there was no reason for the appelant not to inquire into the matter and had he done so and moved the court by application, he would have been granted time to adduce evidence. However, there is nopthing on the record to show that the learned Advocate for the defendant had served due and proper notice on the defendant before retiring from the case and the trial Court had ascertained this fact before passing the ex parte decree against the appellant. According to the appellant,he was at Agra on 6th August, 1986 when the suit was posted for hearing, and on that hearing, the learned Advocate for the defendant had retired from the matter and thereafter the matter was adjourned to 12th August 1986. There is nothing on the record to show that on what date registered notice, if any, was sent by the retiring Advocate to the defendant and whether it was served in time and the defendant-appellant had due and proper opportunity to appear before the Court. The learned trial Judge does not appear to have inquired and ascertained all these aspects before rejecting the application for quashing the ex parte decree.

The learned trial Judge held that the defendant returned to Ahmedabad on 12th August 1986 and thereafter he did not give any aplication to the Court for adjournment or for allowing him to lead any evidence and as such there was no sufficient cause to set aside the ex parte decree. However, there is nothing on the record to show that the defendant was aware of the said date,i.e. on 12th August 1986, when the matter was adjourned for further proceeding. The words "sufficient cause" should

be construed liberally so as to advance substantial justice, when no negligence or inaction or want of bona fide is imputable to a party. There was, therefore, no reason not to allow the application by setting aside the ex parte decree. "Sufficient cause" occurring in Order 9,R.13 of the Code of Civil Procedure,1908 is an elastic expression for which no hard and fast guidelines could be given and Courts have wide direction in deciding what sufficient cause is for the purpose of allowing or rejecting the prayer under O.9,R.13 and the decision on the question must be the cumulative effect of various factors depending upon the facts and circumstances of each case.In the present case, the defendant was out of station and was at Agra on 6th August 1986, when his Advocate retired from the proceedings of the case. The learned trial Judge has accepted the submission of the Advocate that the defendant was duly informed by the Advocate. However, the learned trial Judge has not tried to ascertain as to on what date such notice was sent to the defendant and whether he had proper and adequate time and opportunity to appear in the proceedings of the case. The appellant has averred that at the relevant time he was at Agra in search of employment as he had to discharge his responsibility of his livelihood and that of his family-members and that his family-members, being illiterate and ignorant of all such court proceedings were not aware of the pending proceedings. In this view of the matter, in my opinion, there is sufficient cause to set aside the ex parte decree.

Order XX, R.1 of the Code of Civil Procedure, 1908 provides as under:-

"1.Judgment when pronounced.-(1) The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or, as soon thereafter as may be practicable, on some future day; and when the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders:

Provided that where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within fifteen days from the date on which the hearing of the case was concluded but, where it is not practicable so to do, the Court shall fix a future day for the pronouncement of the judgment, and

such day shall not ordinarily be a day beyond thirty days from the date on which the hearing of the case was concluded, and due notice of the day so fixed shall be given to the parties or their pleaders;

Provided further that, where a judgment is not pronounced within thirty days from the date on which the hearing of the case was concluded, the Court shall record the reasons for such delay and shall fix a future day on which the judgment will be pronounced and due notice of the day so fixed shall be given to the parties or their pleaders.

x x x x x x x."

In the present case, the judgment was not pronounced at once after the case was finally heard. It was adjourned to 8th September,1996 for pronouncement of the judgment. However, it does not appear that a due notice was given to the appellant, inasmuch as his Advocate having retired, he was not represented by any pleader. Therefore, the words "of which due notice shall be given to the parties or their pleaders" occurring in R.1 of Order XX have not been complied with in the present case. In this view of the matter also, the ex parte decree was liable to be quashed.

Mr.Thakkar relied on the case of Patel Maganlal Dhanjibhai and Another v. Patel Laxmandas Naranbhai reported in 1987(1) G.L.H.402. This Court (Coram:A.P.Ravani,J. (as he was then)), construing section 49(1)(c) of Advocates Act,1961 and the Rules framed by the Bar Council under the said provision, held that when the trial court accepted 'no instruction' purshis and permitted the advocate to retire from the case, he ought to have examined as to whether there was sufficient cause and as to whether reasonable and sufficient notice was given to the petitioners-defendants or not. As per the provisions of these rules, before permitting an advocate to retire from the case, the court must examine that (1) there is sufficient cause, and (2) reasonable and sufficient notice is given by the advocate to his client. The said decision is squarely applicable to the facts and circumstances of the case. It is clear from the record that the learned trial Judge was not aware at all about the provisions of the said Rules. On this ground also, the ex parte decree is liable to be

quashed.

Mr.Thakkar also placed reliance on the decision rendered in the case of Nirankar Nath Wahi and others v. Fifth Addl.District Judge, Moradabad and others, reported in AIR 1964 Supreme Court 1268, wherein it has been held that the appellant was denied reasonable opportunity of hearing because he was genuinely handicapped in securing the services of Senior Advocate to appear for him in the matter. In that case, the appellant sought second adjournment of hearing of appeal on the ground of indisposition of his senior counsel from outstation. The Addl. District Judge refused the prayer but granted three days' time for making alternative arrangement and directed that the appeal be posted for hearing of further arguments on 23.5.1983.He further directed that in the event of failure to urge arguments on 23.5.1983 "the judgment will be pronounced". Even so, the appellant again sought an adjournment on the ground that he could not secure the services of his senior counsel as he was not able to appear and prayed for some time to engage a senior counsel. The Addl. District Judge refused the adjournment and dismissed the appeal by pronouncing the judgment which he had kept ready for being delivered. The High Court dismissed the landlord's writ appeal in limine. On appeal, the Supreme Court observed that a reasonable opportunity of hearing ought to have been granted to the appellant because he was genuinely handicapped. In the present case also, no care is taken to see that due and reasonable opportunity is offered to the apellant to contest the suit against him, inasmuch as he was away for just and sound reasons and in his absence the Advocate representing him had retired.

In this view of the matter, the impugned judgment and order deserves to be quashed.

In the result, the Appeal From Order is allowed with costs. The impugned judgment and order of the trial Court is hereby quashed and set aside. The ex parte judgment and decree dated 8.9.1986 passed in Summary Civil Suit No.830/84 is set aside. The Application No.691/86 for restoring the case on file stands granted.

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